No. 22,544

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASSOCIATED INDEPENDENT OWNER OPERATORS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,
and
INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL UNION NO. 12, AFL-CIO, Intervenor

ON PETITION FOR REVIEW OF A DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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THE ISSUE INVOLVED

Whether the Board properly found that the owner-operators are employees rather than independent contractors.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Associated Independent Owner-Operators, Inc., for review of a decision and order of the National Labor Relations Board dismissing a complaint. The decision and order (R. 43-45, 29-36),[1] which issued December 12, 1967, are reported

[1] References designated "R." are to Volume I of the record. References designated "Tr." are to the reporter's transcript of testimony as reproduced in Volume II

at 168 NLRB No. 112. This Court has jurisdiction under Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Section 151, *et seq.*),[2] the alleged unfair labor practices having occurred in Los Angeles, California, and vicinity.

The underlying Board proceeding arose following the issuance of an unfair labor practice complaint alleging that the Union[3] had threatened certain contractors in the construction industry with strikes and picketing, with an object of forcing the contractors to cease doing business with two non-union "owner-operators" working on the job site; and of forcing them to join the Union. By this conduct the Union was alleged to have violated Section 8(b)(4)(ii)(A) and (B) of the Act.

The Board dismissed the complaint, finding that the owner-drivers were employees of the contractors involved. The Board reversed the Trial Examiner's finding that the relationship between the contractors and the owner-drivers was that of "independent contractor" within the meaning of Section 2(3) of the Act. As the parties agree, the only issue presently before the Court is whether the Board properly found that the owner-drivers were employees of the contractors. If so, there could have been no "cessation of business" within the meaning of Section 8(b)(4), and no object of forcing a "self-employed person" to join a union, as alleged in the complaint. The facts upon which the Board based its finding of employee status are summarized below:

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of the record. Where a semicolon appears, references preceding are to the Board's finding; those following are to the supporting evidence.

[2] The pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 13-15.

[3] International Union of Operating Engineers, Local Union No. 12.

I. THE BOARD'S FINDINGS OF FACT

Vance and Watson are owner-operators of light pieces of excavating equipment known as "skip-loaders" (R. 31; Tr. 44, 60). They perform a substantial amount of excavating and other work for various employers in the construction industry.[4] Watson solicits his own work or obtains referrals through friends (R. 31; Tr. 62). Vance finds work himself or through an agent, El Monte Equipment Company, which charges him a 10% commission (R. 31; Tr. 45-46). Both Vance and Watson work at an hourly rate (R. 45; Tr. 46, 62). Neither maintains an office outside of his home, or employs assistants, or bids on jobs (Tr. 47, 62-63, 92-93). Neither is licensed as a building contractor in the State of California (R. 32; Tr. 57, 95).[5]

In August 1966, Vance worked for Webb and Lipow, a subcontractor engaged in shoring and underpinning work at a construction project in Los Angeles (R. 31-32; Tr. 15). Vance's job was to haul loose dirt away from holes being drilled by Webb and Lipow's drill rig operators (R. 31; Tr. 15-16). Initial contact with Vance was made about a week earlier by construction foreman Fletcher, who called a subcontractor and asked for a "skip-loader" (Tr. 19, 37). The subcontractor, in turn, called El Monte, which referred Vance to the job (Tr. 48).

When Vance reported for work, Fletcher told him that his job would be to remove the loose dirt, keep it from dropping back into the holes and

[4] Vance does from 60% to 70% of his work for building contractors, the remainder for private home owners or plumbers (Tr. 44). Watson works primarily for building contractors, occasionally for private home owners (Tr. 62).

[5] The California Business and Professions Code requires the licensing of persons engaged in construction work, including excavating, but exempts "any person who engages in the activities herein regulated, as an employee with wages as his sole compensation." See Sections 7053, 7026; *Johnson v. Silver*, 161 Cal. App. 2d Supp. 853, 327 P. 2d 245, 246.

stay ahead of the drill rigs (R. 31; Tr. 37, 38-39, 40). He told Vance where to dump the dirt and what his hours would be (Tr. 38-40). Pursuant to these instructions, Vance co-ordinated his activities with those of the drill rig operators, taking the same lunch breaks and working the same hours that they did (Tr. 39). Fletcher, the only supervisor on the job, considered Vance to be one of Webb and Lipow's employees (Tr. 15, 19, 37-40).[6]

For about 3 months in 1966, Watson's services were used by three contractors, Swinerston and Wahlberg Company, Oltmans Construction Company, and Jackson Bros., on a shopping center project in Glendale, California (R. 32; Tr. 64, 67). Originally referred to Jackson Bros. by "an excavating friend who couldn't make the job", he thereafter did grading work for all three of them, shifting back and forth as his services were required and receiving his assignments from the respective job superintendents (R. 32; Tr. 63-69).

Watson's work consisted essentially of grading definite areas, the boundaries and levels of which had previously been staked out by acknowledged employees (R. 32; Tr. 98-99). "[He] would grade out one [section], and they would hand grade it or lay their steel and pour it, and [he] would come in and do the next one" (Tr. 66). When he finished each piece of work, he checked with the superintendent to see if it was satisfactory and received instructions as to what to do next (Tr. 99-100). Occasionally he was asked to do some part of the work over again (Tr. 100).

Both men paid all expenses involved in the operation and maintenance of their equipment and received payment from the contractors at

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[6]Webb and Lipow forwarded payment to El Monte for Vance's services. El Monte deducted its commission and remitted the balance to Vance (Tr. 57-58).

hourly rates, without deduction for social security or income taxes (R. 31; Tr. 44, 46-47, 60-61, 63, 93).[7]

II. THE BOARD'S DECISION AND ORDER

On the basis of the foregoing facts, the Board found that Vance and Watson served as employees of Webb and Lipow and the shopping center contractors, respectively, and were not independent contractors as to them. Accordingly, the Board ordered that the complaint be dismissed in its entirety.

ARGUMENT

THE BOARD PROPERLY DETERMINED THAT THE OWNER-OPERATORS ARE EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE ACT.

Section 2(3) of the Act provides, in relevant part, that the term "employee" shall not include "any individual having the status of independent contractor." In enacting this provision, Congress did not define independent contractor status but intended that in each specific case the issue whether an individual is an employee or an independent contractor is to be determined by the application of general agency principles. *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 256, and cases there cited.

Under agency principles all of the incidents of the relationship must be assessed and weighed and no one factor is decisive. One of the critical factors distinguishing employees from independent contractors in the common law of agency is the type and extent of control reserved by those for whom they work. As the court stated in *N.L.R.B. v. Phoenix Life Insurance Co.*, 167 F.2d 983, 986 (C.A. 7), cert. den. 335 U.S. 845:

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[7]Watson also owns a truck and trailer, and Vance rents a dump truck (Tr. 43-45, 60-61). Although this equipment was used to haul the skip-loaders to and from the job sites, it appears that it was not used in the actual grading and dirt-spreading operations in which the two men engaged in the instant case. See, e.g., Tr. 16.

> * * * [T]he test most usually employed for determining the distinction between an independent contractor and an employee is found in the nature and amount of control reserved by the person for whom the work is done. * * * [T]he employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, * * *. [I]t is the right and not the exercise of control which is the determining element (Emphasis added).

Accord: Restatement of the Law of Agency 2d, Sec. 220(1); *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F.2d 709, 713 (C.A. 5); *N.L.R.B. v. Keystone Floors, Inc.*, 306 F.2d 560, 561-562 (C.A. 3); *N.L.R.B. v. Steinberg and Co.*, 182 F.2d 850 (C.A. 5); *N.L.R.B. v. Northwestern Publishing Co.*, 343 F.2d 521, 524 (C.A. 7).

Applying agency principles to the facts of the instant case, the Board properly found that Vance and Watson were employees of the contractors for whom they worked. As shown in the Counterstatement, pp. 3-5, both men owned and operated light pieces of excavating equipment known as "skip-loaders." They had no employees and no place of business outside of their own homes. They obtained work through informal referrals and were retained by construction superintendents on the job sites. They were paid by the hour rather than by the job, had no contracts governing the performance of the work, and, presumably, could be removed at will prior to completion of any job. They performed work which was an essential part of the normal operations of the contractors, with Vance coordinating his activities with drill rig operators and with Watson's work sandwiched between that of the employees who set the grade stakes and the hand shovelers or concrete pourers who came afterwards.

As the Board found (R. 45), the "supervision exercised over Vance and Watson" was, in the "context of the work to be performed," "apparently no less than that exercised over acknowledged employees of the various contractors." Neither Vance nor Watson set their own hours or exercised significant discretion as to how their work was to be performed. Their initial instructions clearly defined the manner of accomplishing the tasks assigned to them. Vance was told, "this loose dirt, we want you to take your loader and haul it and move it away and level it and spread it—take it out on the lot and spread it, and as the drill rigs—keep ahead of them, and keep up with them" (Tr. 40). The only supervisor on Vance's jobsite was a Webb and Lipow supervisor, Fletcher, who testified without contradiction that he directed Vance's work (Tr. 37-40). Although Vance received no additional instructions after his first day on the job, this was not because he was free to choose the means by which to accomplish a result, but rather, as the Board observed, because the "simple description of the job assignment limited the manner and means to be used to accomplish the job" (R. 44). As Fletcher himself explained, "you give the orders what is to be done, and that is all you *need* to do. * * * This is all he had to do—just spread the loose dirt" (Tr. 41, 42, emphasis added).

Watson's work was similarly laid out for him in advance, i.e., the desired grade was determined and marked, leaving only the mechanical work to be done. Upon the completion of one grade, Watson was told where to grade next. The superintendent checked his work and on those occasions when it was improperly performed, ordered it done over (Tr. 100). We submit that the Board could properly find, on the basis of these uncontradicted facts, that Vance and Watson were subject to substantial control by their job superintendents as to the details of their performance.

Although, to be sure, ownership of the instrumentality with which the work is performed is some evidence of independent contractor status, its significance lies in the fact that an individual who brings his own equipment to the job is less likely to follow another's direction in its use. See *N.L.R.B. v. Nu-Car Carriers, Inc.*, 189 F.2d 756, 759 (C.A. 3); Restatement of the Law of Agency, Section 220, comment k. Petitioner loses sight of the fact that where the owner "surrenders complete dominion over the instrumentality and the right to decide how it shall be used, as here, then the fact of ownership loses its significance." *N.L.R.B. v. Nu-Car Carriers, Inc., supra.* Thus, owner-drivers—even those who perform their services away from the employer's job site, such as over-the-road truck drivers—have on other occasions been found to have employee status under the Act. See, e.g., *Deaton Truck Lines, Inc. v. N.L.R.B.*, 337 F.2d 697 (C.A. 5); *N.L.R.B. v. Nu-Car Carriers, Inc., supra*, 189 F.2d 759.[8] The facts surrounding the work of Vance and Watson (*supra*, pp. 3-5, 6-7) clearly show that the requisite control was present in the instant case notwithstanding their ownership of the light equipment which they used in the work.

Petitioner argues that what is significant is not the degree of control reserved over the means, but rather, whether "control [is] exercised in fact * * *" (Br. 8). The case law (*supra*, pp. 5-6) is, however, unanimously to the contrary, and the two cases cited by petitioner do not support the result which it seeks in this case. Actually, *Construction, etc. Drivers Local Union No. 83, IBT (Marshall & Haas)*, 133 NLRB 1144, 1144-1145

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[8] Nor did the Company in *Deaton* withhold taxes or social security from its payments to the owner-drivers. See 143 NLRB 1372, 1384. Accord: *N.L.R.B. v. Keystone Floors, Inc.*, 306 F.2d 560 (C.A. 3), enforcing 130 NLRB 4, 9; *N.L.R.B. v. Lindsay Newspapers, Inc.*, 315 F.2d 709 (C.A. 5), enforcing 130 NLRB 680, 682.

(Pet. Br. 8-9), is precedent for the Board's finding that Vance and Watson were employees. There, owner-drivers "were hired to perform a specific hauling operation * * * Each driver was required to load his truck in succession at the Yuma plant and drive the mixer to the batch operation at the construction site. There each unloaded in turn and returned to the Yuma plant for reloading. * * *" The drivers were "at all times subject to the direction and control of [a representative of the principal]" (133 NLRB at 1145) and were "required to operate in tandem formation and maintain this steady pattern of unloading" (133 NLRB 1145, 1147). In the instant case, the work was also done in accordance with a rigid, predetermined system or formula; and what is more, it was performed on the job site in the continuous presence of a superintendent, who clearly could have intervened at any time in the event of a departure from the preordained plan.[9]

N.L.R.B. v. Servette, Inc., 313 F.2d 67 (C.A. 9), upon which petitioner relies so heavily (Br. 9-13, 16), is distinguishable. That case involved written franchise agreements specifically designed to create a "bona fide wholesaler-retailer relationship to deal in Servette products" (313 F.2d at 69). Each driver purchased his own route, owned his own truck, furnished his own display racks and determined his own hours. He was free to hire a helper or replacement and to determine the helper's compensation and hours of work. He was subject to little if any formal supervision,[10] and suffered a loss on unsold merchandise. See *Servette, Inc.*, 133 NLRB 132, 138,

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[9]None of the cases cited by petitioner as "strikingly similar" deal with relationships having these important characteristics. See Pet. Br. 16-17.

[10]He was, however, required to file daily sales reports.

146. Although, by virtue of its contracts with the routemen, Servette retained some control over their performance, the routemen manifestly had more independence in their work for Servette than did Vance on the Webb and Lipow job, or Watson on the shopping center project. Moreover, Vance and Watson were *hourly paid:* Sound management of their time and energies was of little importance to them in their work on these job sites.[11] As this Court observed in *Servette*, independent contractors are those who "undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials and labor and what they receive for the end result, that is upon profits." 313 F.2d at 71, citing with approval, *Shamrock Dairy, Inc.*, 119 NLRB 998, 1005. Accord: *N.L.R.B. v. Steinberg & Co.*, 182 F.2d 850, 854 (C.A. 5); H. Report 245, 80th Cong., 1st Sess., April 11, 1947, p. 18. Vance and Watson clearly do not fit this mold.[12]

Of course, there were elements in Vance and Watson's work relationships which are often associated with independent-contractor status. Vance

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[11] Of course, like other employees in the construction industry who move from job to job, they would benefit from a reputation as good workers.

[12] The record provides little support for petitioner's contention that the parties "believed they were creating a principal-independent contractor relationship and not an employer-employee relationship" (Pet. Brief, p. 15). The informality with which both men were referred to the jobs and retained, the lack of a contract governing the performance of the work, and the fact that neither was licensed as a contractor in the State of California, would all seem to suggest the contrary. In fact, Superintendent Fletcher testified that he hired Vance, directed his work, and regarded him as one of *his* employees (Tr. 15-19). That Vance in one instance, and possibly where a private homeowner was involved, chose to bring legal action through the courts to collect money due, rather than proceed before a State labor commission, is hardly evidence of the intention of the parties in the instant case.

and Watson were not as obviously "employees" as are construction workers who are supplied with equipment, work for only one employer, and are treated for tax purposes as regular employees. Indeed, this case, like *N.L.R.B. v. United Insurance Co.*, 390 U.S. 254, 258, may even present one of the "innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor * * *." The Board, however, considered all the elements in the work relationship between the owner-drivers and the contractors, and found (R. 45) that "sufficient control over the manner and means by which Vance and Watson performed their duties was retained by the contractors to vitiate the [Examiner's] conclusion that Vance and Watson were independent contractors." Here the "least that can be said for the Board's decision is that it made a choice between two fairly conflicting views, and under these circumstances the Court of Appeals should [uphold the Board's finding]." *N.L.R.B. v. United Insurance Co., supra,* 390 U.S. at 260.[13]

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[13] Although the Trial Examiner found that Vance and Watson were independent contractors, the Board "only disagreed with the examiner as to inferences to be drawn from established facts. This was of course the Board's prerogative" (*N.L.R.B. v. Stafford Trucking Inc.*, 371 F.2d 244, 249 (C.A. 7)). See also, *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496; *Oil, Chemical & Atomic Workers, etc. v. N.L.R.B.*, 362 F.2d 943, 945-946 (C.A.D.C.).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition to review should be denied.[14]

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[14]The only issue before the Court is whether the Board properly dismissed the complaint on the ground that Vance and Watson were employees rather than independent contractors. Accordingly, should petitioner's contention be sustained, we respectfully submit that the case should be remanded for further proceedings consistent with the Court's disposition of this issue, and not, as petitioner asserts (Br. 18) with instructions to enter an order "adopt[ing] the recommended decisions of the Trial Examiner . . ." *Retail Store Employee's Union, Local 400, etc. v. N.L.R.B.*, 360 F.2d 494, 495-496 (C.A.D.C.); *Local 152, Teamsters v. N.L.R.B.*, 343 F.2d 307, 309 (C.A.D.C.); *Retail Clerks Union, Local No. 1179, etc. v. N.L.R.B.*, 376 F.2d 186, 191 (C.A. 9). See also, *Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 372-374.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

* * *

DEFINITIONS

Sec. 2 when used in this Act–

* * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employement, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

UNFAIR LABOR PRACTICES

* * *

Sec. 8 * * *

(b) It shall be an unfair labor practice for a labor organization or its agents–

* * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform

any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor oragnization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part of relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying,

and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * *